

broadband facilities over the past five years. New entrants have contributed significantly to the massive broadband build-out in the United States. As a result of this deployment, a large majority of American homes and businesses now have access to broadband services from telephone companies, cable companies and wireless providers. Although broadband deployment has slowed recently due to economic and marketplace conditions, some deceleration in broadband deployment was inevitable following the massive investments over the last five years.

To the extent there are any issues in the broadband market today, they are on the “demand” side. Carriers have invested \$90 billion in cross-continental fiber-optic long-haul networks, but a mere three percent of that backbone is in use today.<sup>53</sup> Although 85% of Americans have access to broadband services, the take rate is barely at 12%.<sup>54</sup> Millions of local loops are now DSL-ready, but the vast majority of them are not being used for broadband services due to high ILEC prices and lack of innovative broadband applications.

CompTel believes that the low take rate of broadband services can be attributed in large part to the high prices and lack of innovation that result from the current paucity of competition in the broadband services market. A recent study by Hart & Winston confirms that millions of Americans do not purchase broadband services at today’s prices but would become

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<sup>53</sup> Karen Kornbluh, *The Broadband Economy*, N.Y. TIMES, Dec. 10, 2001, at A21.

<sup>54</sup> Michael K. Powell, Remarks at the National Summit on Broadband Deployment 4 (October 25, 2001) (available at the Federal Communications Commission website, [www.fcc.gov/speeches/Powell/2001/spmcp110.html](http://www.fcc.gov/speeches/Powell/2001/spmcp110.html)).

subscribers were prices reduced.<sup>55</sup> Even if prices remained steady, millions of Americans would purchase broadband services if there were more innovative uses for those services.

The primary flaws in today's advanced services market – monopoly pricing and lack of innovation – are the entirely predictable consequence of permitting the ILECs to abuse their monopoly of the wireline portion of the broadband market. For example, once the ILECs succeeded in eliminating their xDSL competitors through shoddy provisioning and other misconduct, they exercised their market power immediately by raising rates by \$10/month.<sup>56</sup>

The best way to ensure optimal broadband supply and demand is to foster a fully competitive telecommunications marketplace, which will create the strongest incentives for all carriers to invest in broadband facilities. In a competitive environment, ILECs make the maximum efficient infrastructure investment because they have no alternative; CLECs make the maximum efficient infrastructure investment if they have TELRIC-based access to existing resources; and broadband demand is optimized as prices are lowered to competitive levels. As such, a competitive market environment is the only practical and effective solution to the demand-side problems that plague the broadband industry today.

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<sup>55</sup> “Broadband Too Pricey for Dial-Up Users, Survey Says,” *Communications Daily* (Nov. 30, 2001) at 8. CompTel readily concedes that other factors affect the relatively low take-rate among U.S. households and businesses. The ILECs’ failure to offer adequate provisioning to competitive broadband providers has been a significant detriment, and many Americans are waiting for more innovative applications and uses before subscribing to advanced services. As Bruce Mehlman noted in a recent speech at the Competition Policy Institute, this may explain why approximately half of the citizens in LaGrange, Georgia do not subscribe to a broadband service even though it is available *for free*. “Policy-Makers See Progress on Competition, But Eye Further Steps to Provide Extra Boost,” *Telecommunications Reports*, Vol. 67, No. 49 (Dec. 10, 2001) at 14.

<sup>56</sup> See, e.g., B. Ploskina & D. Coffield, “Top-Dollar DSL,” *Interactive Week*, (Feb. 18, 2001) (noting \$10/month DSL rate increases introduced by Bell Companies after DSL competitors exited the market).

**B. The Best Way To Encourage Efficient Broadband Deployment is To Implement Fully the Market-Opening Provisions of the 1996 Act.**

For years now, the ILECs have been conducting one of the most disingenuous public relations campaigns in the history of our country. The ILECs are seeking legislative and regulatory changes for the ostensible purpose of promoting their own investment in broadband capabilities, claiming that they have no incentive to invest in broadband facilities and services if they are forced to give competitors access to their networks (particularly through UNEs) at TELRIC-based prices. They argue that without those network sharing obligations, they would invest larger sums more aggressively in such infrastructure.

The *Notice* unfortunately reflects the results of the ILECs' efforts. A recurring issue in the *Notice* is whether the legislative regime established by Congress in the 1996 Act is antithetical to broadband investment by ILECs. For example, the Commission seeks comment on "whether we can balance the goals of section 251 and 706 by encouraging broadband deployment through the promotion of local competition and investment in infrastructure."<sup>57</sup> The Commission also seeks comment on "whether we should modify or limit incumbents' unbundling obligations going forward so as to encourage incumbents and others to invest in new construction."<sup>58</sup> In particular, the Commission seeks comment on "whether the 'at a minimum' language in section 251(d)(2) can support a distinction between unbundling facilities used for analog voice telephony, and those used for advanced technologies."<sup>59</sup>

By framing its questions in terms of providing sufficient incentives for broadband investment *by ILECs*, the *Notice* unfortunately reflects the ILECs' view that broadband

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<sup>57</sup> *Notice*, 16 FCC Rcd at 22792-93, ¶ 23.

<sup>58</sup> *Id.* at 22793, ¶ 24.

<sup>59</sup> *Id.*

deployment is a zero-sum game where their investment is gained at the sacrifice of investment by other broadband service providers. CompTel fundamentally disagrees with the ILECs' view. A win-win approach to broadband investment already exists, and it is embodied in the market-opening provisions of the 1996 Act. Those provisions enable non-incumbent carriers for the first time to gain access to the ILECs' monopoly local exchange networks (which, it must not be forgotten, were bought and paid for by captive U.S. consumers through decades of monopoly rents) in order to gain the market foot-hold necessary to justify their own broadband facilities. Contrary to the ILECs' views, this same regime provides the ILECs with the greatest possible incentive to engage in further investment – namely, the fear of losing customers and revenues to competitors. If the ILECs shy away from this investment, competing carriers will have an even greater incentive to step up their own infrastructure investments. The ILECs understand this phenomenon only too well, and thus they are seeking to pare back or even eliminate their UNE obligations because it will reduce the network investment they will be required to make in order to sustain profitable operations on a going-forward basis.

The Commission cannot hope to maximize efficient investment if it implements policies that undermine competition, because history shows that competition is the single greatest spur to ILEC investment. The ILECs have a proven track record of not making any creative or “risky” investments when they face little or no competition. When ILECs possess an uncontested monopoly, their investment is limited, protective and incremental. As one illustration, for years the customer premises equipment (“CPE”) industry languished while a

monopoly carrier controlled that market. As soon as competition was introduced, the industry and consumers witnessed an explosion of choices, technology and investment.<sup>60</sup>

Particularly under a price cap regime, the ILECs will invest cautiously in an effort to maximize revenues from existing facilities and resources. The ILECs will avoid or delay any new investment that could jeopardize an existing source of revenues. As Professor Lawrence Lessig notes, “[t]he natural desire of any company is to find ways to protect its market.”<sup>61</sup> The ILECs are particularly loathe to develop or implement so-called “disruptive” technologies. However, when ILECs face competitive new entry into a previously protected line of business, they typically respond with new investment, new services, and lower prices all to the benefit of American consumers. Once they conclude that their established products and revenue streams may be undercut by new competitors, the ILECs will set aside their defensive posture and seek to quarry new products and revenues from the market.

One need look no further than the xDSL market segment to see how competition effects the ILECs. Although the ILECs have had xDSL technology for many years, they refused to deploy it in order to protect revenues from T-1 services. As a result, millions of Americans were denied access to advanced telecommunications services and forced to pay higher T-1 rates for dedicated access solely because the ILECs wanted to protect monopoly revenue streams from existing services. Buoyed by the promises of the 1996 Act, numerous entrants sought to provide xDSL services in competition with the ILECs, and the ILECs responded by increasing the scope and timetable for their own xDSL-related investments. (Project Pronto was one such investment

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<sup>60</sup> See *Biennial Regulatory Review of Part 68 of the Commission's Rules and Regulations*, 22 CR 2199, 65 FR 34629 (May 22, 2000).

<sup>61</sup> L. Lessig, *The Future of Ideas*, at 33 (Random House, 2001).

project.) However, due to many factors, including the unchecked failure of the ILECs to perform necessary provisioning in a timely and effective manner, the xDSL competitors have been forced from the marketplace. Once that occurred, it did not take the ILECs very long to begin raising xDSL rates for consumers.<sup>62</sup> This illustrates that the ILECs increase investment when they face competition, and that they dampen consumer demand through monopoly pricing once freed from competitive constraints.

The experiences of various CompTel members confirms that the ILECs invest primarily in response to competition. Numerous CompTel members, including, for example, IP Communications, ITC^DeltaCom, and New Edge Networks – have focused their service offerings in second-tier, third-tier and other under-served markets that the ILECs ignored for years. However, once a competitive carrier entered the market, the ILECs responded immediately by making new investments and introducing new services. This marketplace experience confirms that the primary “incentive” necessary to spur ILEC investment is the existence of competitive market forces. Competition is critical to ensuring that advanced communications services are priced at levels that will sustain growth and achieve the “critical mass of U.S. households” that is critical to the development of this industry segment.

Confirmation that unbundling requirements do not create disincentives for investment is provided by the Bell Companies’ decisions to expand into out-of-region markets by acquiring other Bell Companies subject to unbundling requirements rather than entering the market by requesting UNEs from other Bell Companies. For example, when contemplating investments that would make SBC and Verizon the two largest ILECs in the country, these

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<sup>62</sup> *E.g.*, B. Ploskina & D. Coffield, “Top-Dollar DSL,” Interactive Week (Feb. 18, 2001) (noting \$10/month DSL rate increases introduced by Bell Companies after DSL competitors exited the market).

ILECs could have chosen to invest their money in purchasing “underpriced” UNEs as new entrants outside of their traditional territories – instead they paid handsome premiums to become sellers of these same “underpriced” network facilities by purchasing the ILEC rather than choosing to enter *de novo*.

The bottom line is that a competitive market environment creates a compelling incentive for ILEC investment that overrides whatever incremental disincentives may be created by UNE requirements and TELRIC rate levels. This leads to the conclusion, which may be counter-intuitive to some, that the ILECs’ investment incentives are less when they have larger margins and more unfettered control over their own assets. Therefore, the Commission should foster competition by making ILECs comply with their unbundling obligations under the 1996 Act rather than lessening unbundling obligations based on false claims.

One of the Commission’s most important tools for fostering competition is its ability to enforce the requirements of its rules implementing the Act. Although Chairman Powell has repeatedly emphasized the importance of enforcement as an important tool in effecting competition,<sup>63</sup> the Commission has failed to enforce its own rules effectively. Examples abound where competitive carriers have brought complaints against ILECs to the Commission, only to

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<sup>63</sup> See, e.g., “FCC Chairman Powell Recommends Increased FCC Enforcement Powers for Local Telephone Competition” News Release, May 7, 2001; (“I think the answer is, where you have acted, you need to put more emphasis on enforcement”), Statement by FCC Chairman Michael K. Powell, Q&A with Forrester Research Telecom Forum, May 12, 2001; (“We need a greater emphasis on enforcement, rather than ‘by the grace of us’ regulation”), Statement by FCC Chairman Michael K. Powell, Before the Progress & Freedom Foundation “The Great Digital Broadband Migration”, Washington, D.C., Dec. 8, 2000.

have them languish with the Enforcement Bureau.<sup>64</sup> Furthermore, the Commission has routinely allowed the ILECs to disregard reporting deadlines and other requirements that were established to ensure that promises made to obtain approvals for mergers are kept.<sup>65</sup> Even where the Commission has exercised its broad authority under Section 503 of the Telecommunications Act<sup>66</sup> and its rules<sup>67</sup> to impose forfeiture penalties on ILECs that “willfully or repeatedly” fail to comply with any of the provisions of the Communications Act or Commission Rule,<sup>68</sup> the resulting fines have been paltry. As a result, the ILECs continue to disregard the spirit and the letter of the law.<sup>69</sup>

The Commission’s failure to enforce its rules implementing the market-opening provisions of the 1996 Act or to impose penalties that have any substantial deterrent effect on the ILECs has had a devastating effect on the ability of new entrants to compete effectively. By contrast, the Commission has demonstrated that it is capable of using its authority over

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<sup>64</sup> Attached is a chart showing nine different complaints regarding RBOC merger violations that were brought in the last year. None of them have been resolved, despite the Commission’s promise to address complaints on an expedited basis. This failure by the Commission to resolve competitive providers’ complaints also applies to instances where the ILEC refuses to convert special access circuits to EELs. *See, e.g., In the Matter of Net2000 Communications, Inc. v. Verizon-Washington, D.C., Inc., et al.*, File No. EB-00-018. (The Commission took more than fourteen months to issue a final Memorandum Opinion and Order on a complaint brought by Net2000 Communications, which filed for bankruptcy two months prior to the Commission’s Order.) (Attachment A).

<sup>65</sup> *See, e.g.*, Letter from Carol E. Matthey, Common Carrier Bureau, to Michelle Thomas, SBC Telecommunications, granting an extension of the audit report deadline, 16 FCC Rcd 20159 (2001).

<sup>66</sup> 47 U.S.C. § 503.

<sup>67</sup> 47 C.F.R. § 1.80.

<sup>68</sup> 47 C.F.R. § 1.80(a)(2). Specifically, the Commission can impose a forfeiture penalty that “shall not exceed \$110,000 for each violation or each day of a continuing violation,” with a maximum penalty not to exceed \$1,100,000. 47 C.F.R. § 1.80(b)(2).

<sup>69</sup> *See e.g., In re SBC Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 1140 (2000). The Commission found SBC liable for a forfeiture in the amount of \$88,000, or \$8,000 for each of the 11 violations of the *SBC/Ameritech Merger Order* (14 FCC Rcd. 14712 (1999)) over a period of 13 months.



“continuing violations” and “willful” misconduct to enforce its “slamming” rules. The Commission has tackled the problem of repeat slamming offenders by pursuing multiple slamming incidents at a time, thereby assessing carriers millions of dollars in forfeitures at once, as well as by charging a premium for egregious behavior.<sup>70</sup> The Commission must adopt a similar enforcement policy with regard to the provision of UNEs to competitive providers to ensure that the goals of the 1996 Act are achieved.

**C. The Act Permits no Distinction Between “New” and “Old” ILEC Investment**

In the *Notice*, the Commission asks whether it should “modify or limit incumbents’ unbundling obligations going forward so as to encourage incumbents and others to invest in new construction. For example, should [the Commission] exempt from an unbundling obligation any facilities that an incumbent LEC constructs after a set point in time?”<sup>71</sup> The Commission further asks whether it should “exempt from unbundling obligations only certain types of new facilities, such as those intended to provide advanced telecommunications capabilities. In particular, should fiber loops be categorically de-listed, while copper loops remain UNEs? Or, as one party has suggested, should [the Commission] exempt from unbundling all fiber- based broadband facilities deployed by incumbents ‘in new build and total

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<sup>70</sup> See, e.g., *In re America's Tele-Network Corp.*, Order of Forfeiture, 16 FCC Rcd 22350 (2201) (fining ATNC \$1,020,000 for 17 violations brought by 16 different complainants); *In re All American Telephone, Inc.*, Order of Forfeiture, 16 FCC Rcd 16601 (2001) (fining All American \$920,000 and adjusting the forfeiture for each violation upward to \$80,000 from \$40,000 for the egregious nature of the conduct involved).

<sup>71</sup> *Notice*, 16 FCC Rcd at 22793, ¶ 24.

rehab situations?”<sup>72</sup> Along those same lines, the Commission asks whether it should adopt “different rules for new ‘overlay’ facilities that duplicate existing facilities than for new deployment that completely replaces old facilities,” and if it should consider “whether the incumbent LEC has multiple alternative facilities in place to serve a specific customer in determining what, if any, facilities the incumbent must provide on an unbundled basis?”<sup>73</sup>

The Commission also seeks comment on “whether the ‘at a minimum’ language in [S]ection 251(d)(2) can support a distinction between unbundling facilities used for analog voice telephony, and those used for advanced technologies” and “whether, in lieu of limiting incumbents’ unbundling obligations to encourage investment in new facilities, [the Commission] might clarify or modify [its] pricing rules to allow incumbent LECs to recover for any unique costs and risks associated with such investment.”<sup>74</sup> The Commission further asks whether such an approach would “adequately encourage new construction”<sup>75</sup>

CompTel strongly opposes any distinction between “new” and “old” ILEC facilities. All ILEC facilities are subject to Section 251, which provides absolutely no basis for distinguishing between “new” and “old” investments. Moreover, ILECs do not build and operate two separate networks, but rather a single, integrated network. Accordingly, “legacy” and “broadband” networks are one and the same. Given the widely-noted trend towards

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<sup>72</sup> *Id.* See also *id.* At 22804, ¶ 50 (seeking comment on whether the Commission should “adopt unbundling requirements specific to the unique characteristics of the underlying facilities” and how it “should treat deployment of new facilities by incumbent LECs for the purposes of our loop unbundling requirements” and whether it should “apply the same requirements to all transmission facilities or . . . distinguish between copper, fiber and wireless facilities”).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 22793, ¶ 24.

<sup>75</sup> *Id.*

convergence, it should be expected that the ILECs will continue to expand and upgrade their network as an integrated whole. Accordingly, even if the Act permitted the Commission to distinguish between “new” and “old” investments, there is no policy justification for the Commission to adopt separate regulatory regimes for the ILECs’ “legacy” and “broadband” networks

Because it is impossible to segregate the “broadband” and “legacy” portions of the ILECs’ physical networks in any meaningful way, any policies that seek to impose differing requirements on the ILECs’ “broadband” and “legacy” networks would be fatally arbitrary and serve no purpose except to generate expensive litigation and regulatory proceedings as parties seek to clarify, challenge and defend a non-existent (or at best blurred) boundary line between “broadband” and “legacy” networks. Further, making such a false distinction would provide an unfortunate incentive for the ILECs to re-engineer their networks in order to create the illusion of separate “broadband” and “legacy” networks. In addition, such a distinction would give the ILECs an incentive to accelerate the deterioration of their “legacy” networks (to which its competitors would have mandatory access) while focusing their efforts on their “broadband” networks (which they feel should be off-limits to competitors). The end-result would be to skew network development, generate inefficient investment, and undermine broadband competition. The Commission should not seek to distort the broadband marketplace through misguided regulatory intervention lacking any foundation in the real world. Rather, the Commission should advance the goals of the Act by making UNEs available to competitive carriers.

**D. Granting CompTel's Petition for Reconsideration of the Line-Sharing Order Would Facilitate Deployment of Broadband Facilities**

For years, the ILECs have tied their local voice services with their xDSL products. As a result, a customer that wishes to obtain xDSL service from the ILEC while obtaining local voice service from a competing carrier often is rejected by the ILEC. Were there numerous alternative providers of xDSL services in the market today, these tying arrangements would not be so destructive. However, the promise of xDSL competition has dimmed significantly over the past two years, and now the ILECs often are the only xDSL alternative for the vast majority of subscribers. Unfortunately, the Commission has declined to take the steps necessary to promote consumer choice. For example, CompTel filed a petition for reconsideration on March 8, 2001 asking the Commission to declare that requesting carriers are entitled to purchase the 'low frequency' portion of the loop as a mandatory UNE for the provision of telecommunications services to customers.<sup>76</sup> CompTel's petition remains pending at the Commission. The Commission should take immediate action to end these anti-competitive tying arrangements in order to permit subscribers to obtain xDSL and local voice services from the providers they choose.

**1. The Commission should find affirmatively that the "low frequency" portion of the local loop satisfies the definition of the Commission's existing subloop UNE.**

In its Petition, CompTel demonstrated the need for the Commission to confirm and clarify that the "low frequency" portion of the local loop satisfies the Commission's

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<sup>76</sup> See *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 16 FCC Rcd 2101 (2001) (refusing to resolve xDSL/voice tying issues raised by AT&T).

definition of a subloop UNE, and that nothing in either the *Line Sharing Order* or *Line Sharing Reconsideration Order* precludes a competitor from purchasing the “low frequency” portion of the loop to provide telecommunications service.

Adopting the ruling sought by CompTel will help to ensure that new entrants needing only a portion of the loop to provide services requested by a consumer are entitled to obtain such access without needing to pay for the entire loop.<sup>77</sup> That entitlement cannot be taken away by the ILECs’ provision of xDSL services over the upper frequencies of the same loop. By clarifying that the low frequency portion of the loop constitutes a subloop UNE, the Commission would allow the ILEC to continue providing xDSL services over the upper frequency portion of the loop without “reselling” a portion of the voice provider’s loop.

There can be no doubt that the lower frequency portion of the loop qualifies as a “subloop” under applicable rules. The Commission has defined the subloop UNE as follows:

“The subloop network element is defined as any portion of the loop that is technically feasible to access at terminals in the incumbent LECs’ outside plant, including inside wire. An accessible terminal is any point on the loop where technicians can access the wire or fiber within the cable without removing a splice case to reach the wire or fiber within. Such points include, but are not limited to ... the main distribution frame.”<sup>78</sup>

Access to the “lower frequency” portion of the local loop is clearly technically feasible at the main distribution frame.<sup>79</sup> Indeed, technicians access loops at the main distribution frame for line sharing and line splitting arrangements. Thus, the Commission should confirm and clarify

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<sup>77</sup> *UNE Remand Order*, 15 FCC Rcd at 3791, ¶ 211.

<sup>78</sup> 47 C.F.R. § 51.319(a)(2).

<sup>79</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, Third Report and Order, 14 FCC Rcd 20912, 20942-45, ¶¶ 63-68 (1999) (“*Line Sharing Order*”).

that the “lower frequency” portion of an unbundled loop used to provide telecommunications services satisfies the current definition of subloop.

Regarding subloops, the Commission has noted that “if competing carriers that need only a portion of the loop must either pay for the entire loop or forego access to that loop altogether, many consumers will be denied the benefits of competition.”<sup>80</sup> This is exactly what will happen if consumers are precluded from accessing competitive services by ILECs providing xDSL services over the high frequency portion of a consumer’s line. Again, the Commission has recognized that line sharing and line splitting primarily will benefit residential and small business consumers – two groups that presently have little access to competitive services.<sup>81</sup> The Commission should not foreclose the ability of competitors to provide voice services to these consumers by enabling ILECs to use xDSL services to defeat a requesting carrier’s statutory entitlement to subloop UNEs in order to protect their monopoly hold over residential and small business consumers. By declaring that the lower frequency portion of a line satisfies the definition of the subloop UNE, the Commission would ensure that new entrants continue to have access to these consumers.

**2. The Commission should clarify that the ILECs’ line splitting obligation applies equally to requesting carriers using the UNE-P and UNE-L entry strategies.**

In its Petition, CompTel demonstrated the need for the Commission to clarify that requesting carriers adopting a UNE-P and/or UNE-L market entry strategy may utilize line

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<sup>80</sup> *Id.* at 20936, ¶ 46, citing *UNE Remand Order*, 15 FCC Rcd at 3791, ¶ 211.

<sup>81</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration, 16 FCC Rcd 2101, 2112-13, ¶ 23 (2001) (“*Line Sharing Reconsideration Order*”); *Line Sharing Order*, 14 FCC Rcd at 20927, 20929, ¶¶ 25, 32.

splitting arrangements. CompTel also demonstrated the need for the Commission to hold that, to the extent that an ILEC has agreed voluntarily to provide the splitter for line sharing arrangements, the ILEC similarly should be required to provide the splitter for line splitting arrangements. Such a clarification is consistent with the Commission's emphasis on the ILEC's "larger obligation under our rules to provide access to network elements in a manner that allows a competing carrier 'to provide any telecommunications service that can be offered by means of that network element.'"<sup>82</sup> The Commission should clarify that this "larger obligation" requires ILECs under the current rules to facilitate line splitting regardless of whether the requesting carrier is following a UNE-P or a UNE-L strategy. Any other result would sanction ILEC discrimination in favor of line sharing over line splitting.

CompTel recognizes that the ILEC may be required to perform some additional network modifications where the voice provider is a UNE-L carrier. In particular, the ILEC would need to provide a cross-connect between the UNE-L carrier and the data carrier. This type of modification is well within the Commission's well-established rule that ILECs are "required to make all necessary network modifications to facilitate line-splitting."<sup>83</sup> As the Commission has emphasized, "our rules require incumbent LECs to make network modifications to the extent necessary to accommodate interconnection or access to network elements."<sup>84</sup>

Moreover, the ILECs provide this exact cross-connect arrangement to themselves when self-provisioning DSL and voice to their end users, and the nondiscrimination requirement

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<sup>82</sup> *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2113, ¶ 24.

<sup>83</sup> *Id.* at 2111, ¶ 20.

<sup>84</sup> *Id.*, n.36.

of Section 251(c)(3) mandates that the ILECs provide a similar arrangement to competitors. As the Commission has concluded:

the phrase “nondiscriminatory access” in [S]ection 251(c)(3) means at least two things: first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself.<sup>85</sup>

There is no doubt that the ILECs cross-connect loops to splitters for their own purposes. As such, Section 251(c)(3) compels a finding that ILECs must make this cross-connect functionality available.

Finally, the Commission has found that an ILEC may lease splitter capacity to a requesting carrier to implement line sharing.<sup>86</sup> To the extent that the ILEC does lease splitter capacity in a line sharing arrangement, CompTel submits that such access should apply equally to line splitting arrangements. In the *Line Sharing Order*, the Commission found that, to maintain voice and data service quality, ILECs “may maintain control over the loop and the splitter functionality if desired.”<sup>87</sup> If an ILEC makes such a determination for line sharing, then the ILEC should be required to provide similar splitter access to carriers engaged in line splitting. Any other result would risk service degradation to carriers engaged in line splitting, as compared to carriers engaged in line sharing.

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<sup>85</sup> *Local Competition Order*, Order, 11 FCC Rcd at 15658, ¶ 312.

<sup>86</sup> *Line Sharing Order*, 14 FCC Rcd at 20949-50, ¶¶ 76-77.

<sup>87</sup> *Id.* at 20949, ¶ 76.



**3. The Commission should clarify that once an ILEC qualifies a loop for DSL service, an ILEC may not assess additional qualification charges on subsequent carriers.**

CompTel also requested that the Commission clarify that once an ILEC qualifies a loop for DSL service – provided by either the ILEC or a new entrant – the ILEC may not assess additional qualification charges on carriers that subsequently wish to provide service over the previously qualified loop. In so doing, CompTel noted that the Commission would ensure that competitive carriers and ILECs pay their fair share for loop qualifications, and that the ILEC would not over-recover by assessing additional loop qualification charges on previously qualified loops.

In qualifying loops for DSL service, CompTel understands fully that ILECs incur costs whether a loop is qualified on behalf of a competitive carrier seeking to provide DSL service or an ILEC seeking to provide its own DSL service. CompTel further agrees that the ILECs should have the ability to recover such qualification charges from the carrier that requests the qualification of a given loop. In cases where loop qualification is first conducted on behalf of an ILEC retail customer, the ILEC should pay the cost of loop qualification. In cases where loop qualification is first conducted on behalf of an entrant's end user, the entrant should pay the cost of loop qualification. In cases where an end user served by a pre-qualified loop migrates from one carrier to another, the Commission should foreclose the ability of an ILEC to assess an additional loop qualification charge.

**E. Ensuring that Competitors Have Access to Buildings Would Facilitate Broadband Deployment**

CompTel endorses broadband policies that ensure competitors have access to the buildings where their customers are located. As a member of the Smart Buildings Policy Project

(SBPP), CompTel endorses the building access and redundancy requirements devised by SBPP for federally owned or leased buildings. CompTel members support policies that require at least two physically separate means of entering a building to provide telecommunications services, at least two physically redundant local networks and reasonable and non-discriminatory access to the entry points, and utility spaces needed to provide services to customers in each building.<sup>88</sup>

**III. THE ACT REQUIRES THE COMMISSION TO PERFORM A THOROUGH IMPAIR ANALYSIS, NOT THE TYPE OF “GRANULAR” APPLICATION DISCUSSED IN THE NOTICE**

In the *UNE Remand Order*, the Commission concluded that the failure to provide access to a network element would ‘impair’ the ability of a requesting carrier to provide the services it seeks to offer “if, taking into consideration the availability of alternative elements outside the incumbent’s network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier’s ability to provide the services it seeks to offer.”<sup>89</sup> In the *Notice*, the Commission seeks comment on whether it should develop a more “granular” approach to applying the impair standard. For example, with respect to transport, the Commission asks whether,

“given the prevalence of competitive transport providers, [it] should . . . apply service, geographic, capacity or other distinctions to the availability of unbundled transport? Given the point-to-point nature of most transport facilities, how would [the Commission] apply geographic disaggregation to this network element? Could [the Commission] consider all potential routes

<sup>88</sup> See Response of the Smart Buildings Policy Project (“SBPP”) to the Request by the National Telecommunications and Information Administration (“NTIA”) for Comment on Deployment of Broadband Networks and Advanced Telecommunications Services, <http://www.ntia.doc.gov/ntiahome/broadband/comments3/SBPP.htm> (Dec. 19, 2001).

<sup>89</sup> *UNE Remand Order*, 15 FCC Rcd. at 3725, ¶ 51.